SUPREME COURT, U. S.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION AND GENERAL REINSURANCE CORPORATION,	No. 1177
WARD INDUSTRIES CORPORATION,	No. 1178
UNION TANK CAR COMPANY,	No. 1179

Petitioners,

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

Respondents.

RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The Opinion of the Court of Appeals (..... Fed (2) .....) is annexed as Appendix "A" infra, pages A1 to A14. The District Court made findings of fact and conclusions of law (R1220-1240) which are set forth as Appendix "B" infra, pages B1 to B25.

STATUTES INVOLVED

The three Petitions set forth statutes which the respective petitioners believe to be involved. In addition are the following sections of the Bankruptcy Act:

> Section 16. Co-Debtors of Bankrupts. The liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." (U.S.C., Title 11, Chap. 3, Sec. 34)
>
> "Section 302. The provisions of Chapter I to VII, inclusive, of this act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter * * *" (U.S.C., Title 11, Chap. 11, Sec. 702).

STATEMENT OF THE CASE

The case turns upon resolving numerous disputed questions of fact, including the basic fact issue whether Mosher as a fabricator of materials bargained for and received only the promise of IMI (subsequently bankrupt) or, additionally, the obligation of Ward as a member of the IMI-Ward joint venture or, still additionally, the direct promise of Union, whose contract with Fluor, the prime contractor, covered the work in question. Ward and Union each claimed that not it, but the other, made a promise to Mosher, and Union claimed that if it made a promise it was only as a guarantor so that its liability would be secondary to Ward's.

After months of study of a voluminous record and briefs of hundreds of pages the trial court made specific findings favorable to Mosher on all the disputed fact

questions, including the finding that Mosher exacted and received the direct promise of both Ward and Union, as well as IMI, for payment of the materials.

With this finding the questions of law fell into place almost automatically because Union's defenses were largely based upon its claim of secondary liability only and the defense of Fluor and its Miller Act sureties was based on the claim that its first-tier subcontractor, Union, had incurred no direct obligation to Mosher.

The Court of Appeals made an independent examination of the record with this result, as stated at the outset of the Opinion.

> "Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them. We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States v. Real Estate Boards*, 339 U.S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not 'left with the definite and firm conviction that a mistake has been committed' in any of the trial court's findings. *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395 (1948); see *Commissioner v. Duberstein*, 363 U. S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them."

Thus the substantial points of difference between the parties have been put to rest by findings of the trial

court accepted by the Court of Appeals after an independent examination of the record.

Nevertheless, the Petitions here, like the briefs of petitioners in the Court of Appeals, persist in reciting bits and pieces of testimony in opposition to the findings of the trial court.

For example, pages 6 through 8 of Ward's Petition seek to establish by carefully selected statements that Mosher dealt with IMI rather than with the IMI-Ward joint venture, whereas from the evidence as a whole the trial court found that Mosher dealt with the IMI-Ward joint venture, and that the various representatives mentioned in Ward's Petition represented the IMI-Ward joint venture rather than IMI.

For further example, in pages 3 through 9 of Union's Petition, Union attempts to show, by isolated quotations from testimony, that it did not become obligated to Mosher, or that if it did, it was only a surety, whereas from the evidence as a whole the trial court found that Union *did* promise payment to Mosher, and as a *direct* obligation rather than as surety for Ward.

Similarly, Fluor's effort, in its Petition, to remove Mosher from the status of a supplier holding the direct obligation of a first tier sub-contractor under the Miller Act simply ignores the finding of the trial court, accepted by the Court of Appeals, that Union undertook a direct obligation to Mosher.

Thus the short answer to all three Petitions is that they amount to no more than a last-ditch effort to reopen fact disputes which have been settled by find-

ings of the trial court accepted by the Court of Appeals after an independent examination of the record.

THE WARD PETITION

Ward claims an equitable estoppel against Mosher on the theory that an inconsistency exists between Mosher's status as a creditor of IMI in the Chapter XI reorganization of IMI and its status as a creditor of the IMI-Ward joint venture.

Of course a claim of equitable estoppel comes with poor grace from one like Ward which has received full credit on Mosher's judgment against it for the stipulated value of the stock received by Mosher in the IMI reorganization and was itself a party in the proceeding and remained silent as to any supposed inconsistency in Mosher's position.

Being helped and not hurt by the small salvage on its debt realized by Mosher in the reorganization proceeding and thus being in no position to assert estoppel, Ward says that the statutory scheme of distribution with respect to partnership and individual debts and creditors was not followed by the bankruptcy court in the Chapter XI proceedings, as if Ward may assert a kind of pro bono publico position which it cannot assert in its own interest. But this statement comes wholly out of thin air. There is simply nothing in the record, as long as the record is, to indicate any disturbance of the statutory scheme of distribution.

But the basic answer to the claim of estoppel is that no inconsistency exists between Mosher's claim in the

reorganization proceeding and its claim here. It is simply *not* true that Mosher's claim in the reorganization proceeding was asserted as an individual obligation of IMI created by its independent undertaking as opposed to IMI's obligation as a member of the IMI-Ward joint venture.

As shown in the findings (Nos. 52 and 53, Appendix B, page B21) and in the Opinion of the Court of Appeals (Footnote 10, Appendix A, page A9), the opposite is the truth. Throughout the reorganization proceeding Mosher's claim was identified as the *same* claim upon which liability was also asserted against Ward as a joint venturer with the debtor and against Union, Fluor and the sureties, with explicit reservation of rights against all obligors. Thus, the Court of Appeals:

> ". . . The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.
>
> Thus, unlike the claimant in *Eads Hide & Wool Co. v. Merrill*, 252 F. 2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation."

THE UNION PETITION

Union's Petition makes the same claim as Ward with respect to equitable estoppel. Like Ward, Union was a party to, and an important factor in, the IMI reorganization. Union received a large percentage of the stock of IMI issued upon its reorganization. Like Ward, it made no complaint in the Bankruptcy Court with respect to the distribution of stock to Mosher, and like Ward it has received the full benefit in the District Court's judgment of the value of the stock which Mosher received in the reorganization.

Like Ward, Union simply refuses to admit that the claim made by Mosher in the reorganization fully set forth the fact that its claim against IMI was *in its entirety the same claim* which Mosher asserted against Ward *as IMI's joint venturer*. This suit was pending in the District Court in Tucson at the time the reorganization proceeding was in progress and is identified by docket number in the Bankruptcy Court's judgment awarding the stock to Mosher.

Considering its full statement of the claim against all obligors and its reiterated reservation of rights against Ward *as joint venturer* and against Union and Fluor *for the same debt*, it is difficult to imagine how Mosher could have more effectively notified the Bankruptcy Court and all of the claimants therein of its position as a joint venture creditor.

Of course, it has long been the policy of the Bankruptcy Act to encourage claimants against the estate of bankrupts to participate in bankruptcy proceedings

notwithstanding that co-debtors exist who are also liable to the claimant for the same debt. This is embodied in Section 16 of the Bankruptcy Act (U.S.C., Title 11, Chapter 3, Section 34), which is also applicable in Chapter XI proceedings (U.S.C., Title 11, Chapter 11, Section 702).

One purpose of these provisions of the Bankruptcy Act is to protect co-debtors. The co-debtors, Ward and Union, have, in fact, been protected by these provisions here in that they have obtained the entire benefit of the distribution which Mosher obtained in the reorganization proceeding. If Mosher had not participated in the Chapter XI proceedings, Union and Ward would have lost the $52,170.62 credit which the judgment here allows them.

Union says that it should have had equitable relief against Ward on the ground that Union was a surety for Ward.

Upon the trial, and prior thereto, Union never admitted that it was a surety for Ward, but asked relief with respect to Ward only if Union were held to be a surety.

In view of the trial court's finding that Union's relationship to the debt was that of a direct obligor, not a surety, it would appear obvious the surety issue was, indeed, tried by the court and the court found that the relationship of principal and surety as between Ward and Union did not exist. Hence, the court properly dismissed the counterclaim.

Finally, Union attacks the awarding of prejudgment interest on the ground of supposed conflict with Arizona law. Certainly the well-reasoned Opinion of the Court of Appeals is a sufficient answer.

THE FLUOR PETITION

Like Union, Fluor simply will not face up to the finding that Mosher had a direct contractual relationship with Union and gave the written notice to Fluor required by 40 U.S.C. Section 270B. Thus, Mosher's relationship to Fluor and Union is variously described by Fluor as being indirect, and it is stated that somehow Mosher was not a materialman.

Fluor's characterization of the essence of the judgment against Union as being one of "secondary liability" is simply a misstatement of the Court's findings in an effort to invoke the rule of *Clifford F. MacEvoy* v. *U. S.*, 1944, 322 U. S. 102, 64 Sup. Ct. 890, 88 Law. Ed. 1163, which would apply only if Mosher did *not* have a direct contractual relationship with Union.

Fluor laments that this is a situation in which it would have been difficult or impossible for the prime contractor to protect himself.

This can only mean that Fluor could not protect itself because Union refused to recognize the contractual relation, and Mosher had to file suit in order to substantiate it. Thus, the rights of a materialman having direct contractual relationship with a first-tier subcontractor should be forfeit merely because the first-tier sub-contractor disputes the contractual relationship.

From a practical standpoint, in the unlikely event that Fluor felt ill at ease as to the financial ability of Union to discharge Union's obligation, Fluor "could easily have protected itself by requiring appropriate security from Union." (Opinion, Appendix A, page A11.)

Secondly, Fluor complains of the allowance of prejudgment interest while admitting that state law is applicable to interest on Miller Act claims. Fluor, like Union, takes the Court of Appeals to task, and is best answered by the carefully considered Opinion of the Court of Appeals.

In respect of prejudgment interest, Fluor misstates the facts both directly and by innuendo as to the credit granted to it equal to the value of the stock received by Mosher in the IMI reorganization.

The fact is, Mosher did concede that the value of the stock should be credited against the judgment, and the only question was the value of the stock on the date of issue. Fluor, by quoting portions of the transcript, attempts to make it appear that Mosher was desperate to obtain a stipulation as to the value of the stock. The fact is, the defendants stipulated to the value without in any way being pressured to do so by the Court, and the stipulated value unquestionably was approved by the defendants as being greater, or certainly no less than testimony would have established.

In the vernacular, Fluor's position is as follows: "Mosher, you have, through arduous, diligent, and ex-

pensive litigation in the reorganization of IMI, which was also obligated for this debt, obtained and credited to our account the sum of $52,170.62. As a result of your obtaining this credit for our account, we are not liable to you for some $100,000.00 of prejudgment interest which otherwise would be absolutely and conclusively due to you under the law of Arizona because of our refusal to pay the sum which we owed you and the lengthy delay which resulted from our refusal."

Finally, Fluor cites as being in conflict with the Opinion of the Court of Appeals *Millers' National Ins. Co.* v. *Wichita Flour M. Co.*, 257 F. 2d 93 (C.A. 10, 1958), which allowed the payment of interest after an otherwise uncertain claim was rendered certain by a stipulation at the trial.

As the Court of Appeals has pointed out, there was clearly no doubt as to the qualification of Mosher's entire claim for prejudgment interest prior to the date upon which the stock was issued to Mosher in the Chapter XI reorganization, so that the question in this case is whether the receipt of the stock renders unliquidated an otherwise liquidated claim, whereas, in the *Millers' National Insurance* case, the claim itself was never liquidated until the stipulation occurred.

In this case it was not the stipulation which permitted the imposition of prejudgment interest. It was the claim itself, and the stipulation as to value (or had the parties not stipulated, the value which the Court would have found from testimony relating thereto) merely de-

creased the obligation of the judgment debtors and saved them from interest pro tanto after the date of receipt of the stock.

CONCLUSION

For the reasons stated, respondents pray that no writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Ninth Circuit.

FLUOR CORPORATION, LTD., et al., UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,
Appellants and Cross-Appellees,
vs.
UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY,
Appellees and Cross-Appellants.

No.21,307
No.21,307A
No.21,307B
No.21,307C

[January 6, 1969.]

Appeal from the United States District Court for the District of Arizona.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*

BROWNING, *Circuit Judge:*

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in Arizona and California.[1] We affirm the trial court's judgment except as it denied prejudgment in-

[1]Prior litigation in this court arising out of these projects is reported in *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 361 F. 2d 43 (1966); 371 F. 2d 722 (1967); 378 F. 2d 241 (1967).

terest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States* v. *Real Estate Boards*, 339 U. S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395 (1948); see *Commissioner* v. *Duberstein*, 363 U. S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Construction Corp., who are not parties to this litigation, were the prime contractors for the California launch facilities.

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[2]The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

Fluor and Matich & Sundt entered into separate first-tier subcontracts with Union Tank & Mfg. Co.[3] Union, in turn, entered into second-tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance of its subcontract, Union, on October 10 or 11, 1961 instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for the required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order

[3]Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

could be mailed. Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

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[4]The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. *Merritt-Chapman & Scott Corp.* v. *Gunderson Bros. Eng'r Corp.*, 305 F. 2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher submitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U. S. C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statute of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher

[5]Since Fluor was not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

which Mosher was not already obligated to do under its October agreement with Union, and, therefore, any promise by IMI-Ward was not supported by consideration. Furthermore, the only consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver v. Boehm*, 286 F. 2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the district court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect

[6]Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

and advance its own interests under its subcontracts. . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds, even though IMI-Ward was also obligated to pay for the work. *Holmes* v. *Suffrin*, 198 Ill. App. 45 (1916); *Peters* v. *Raven*, 159 Ill. App. 122 (1910); *Leisman & Co.* v. *Otto*, 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126*, 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration, because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward purchase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

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[7]Union also contends that its commitment was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do—whether used in construction of the Arizona facilities or those in California.

[8]The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

Ward's reliance upon *Colorado Nat'l Bank of Denver* v. *Boehm, supra,* 286 F. 2d 494, is also misplaced. Mosher's insistence upon a direct commitment from Union, does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters* v. *Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.* Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result

*See, for example, *Wreen* v. *Moskin,* 226 App. Div. 563, 235 N. Y. S. 405 (1929); *American Mut. Life Ins. Co.* v. *Hanna, Zabriskie & Daron,* 297 Mich. 599, 298 N. W. 296, 299 (1941); and *Matanuska Valley Bank* v. *Arnold,* 223 F. 2d 778 (9th Cir. 1955).

urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike claimant in *Eads Hide & Wool Co. v. Merrill*, 252 F. 2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that Union "take nothing by its

[10]Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, . . . Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable. . . ."

[11]Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

counterclaim." Union contends that the existence of a principal-surety relationship not only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusions of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson v. Roth,* ..... F. 2d ..... (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U. S. C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the pay-

[12]In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . . as he has regardless of consistency . . ." Fed. R. Civ. Proc. 8(e)(2).

ment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy v. United States*, 322 U. S. 102, 110 (1944). Fluor could easily have protected itself by requiring appropriate security from Union. *See Hill v. American Surety Co.*, 200 U. S. 197, 204-205 (1906); *Mankin v. Ludowici-Celandon Co.*, 215 U. S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Arizona follows the same general rule.[13]

[13]The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. *United States Fidelity & Guar. Co.* v. *California-Arizona Const. Co.*, 21 Ariz. 172, 186 Pac. 502, 509 (1920); *Palmcraft Dev. Co.* v. *Phoenix*, 46 Ariz. 400, 51 P. 2d 921 (1935); *Schwartz* v. *Schwerin*, 85 Ariz. 242, 250, 336 P. 2d 144, 149 (1959); *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the court's discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the IMI stock which Mosher received in partial payment of its claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the

[14]Cross-appellees also intimate that Mosher should be denied prejudgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damage, does not bar recovery of prejudgment interest. Restatement, Contracts § 337 (a), comment d. Despite disputed liability, prejudgment interest was awarded in both *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); and *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967). California cases to the same effect are collected in 5 U. C. L. A. L. Rev. 262, 266 n. 28 (1958).

stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount payable in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is allowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co.* v. *North American Aviation*, 55 Cal. Rep. 1, 420 P. 2d 713 (1967).

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[15] *Hansen* v. *Covell*, 218 Cal. 622, 631-32, 24 P. 2d 772, 775, 89 A. L. R. 670 (1933) (in banc); *McCowen* v. *Pew*, 18 Cal. App. 482, 483 *et seq.*, 123 Pac. 354, 355-56; *Hunt Foods* v. *Phillips*, 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U. C. L. A. L. Rev. 262, 268, n. 37 (1958). *See also Mall Tool Co.* v. *Far West Equip. Co.*, 45 Wash. 158, 273 P. 2d 652, 663 (1954); *Sam Macri & Sons, Inc.* v. *United States*, 313 F. 2d 119, 129-30 (9th Cir. 1963); *American Sur. Co.* v. *United States*, 368 F. 2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contract § 1046, p. 286, § 1051, pp. 305-06.

"In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

[16] *Hansen v. Covell*, 218 Cal. 622, 631-32, 24 P. 2d 772, 775-76 (1933) (in banc); *Hunt Foods* v. *Phillips*, 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY, *Plaintiffs*, *vs.* THE FLUOR CORPORATION, LTD., et al., *Defendants.*	No. Civil-1605 Tucson

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT.

This action having been tried upon the facts before the Court, sitting without a jury, the Court does hereby find the facts and states separately its conclusions of law thereon, and directs entry of judgment, as follows:

FINDINGS OF FACT.

1. Use-plaintiff, Mosher Steel Company (hereinafter "Mosher", is and was at all times material herein a corporation and a citizen of Texas. Defendant Fluor Corporation, Ltd., (hereinafter "Fluor"), is and was at all times material herein a corporation and a citizen of California. Defendants Federal Insurance Company, Vigilant Insurance Company, Insurance Company of North America, General Insurance Company of America, Seaboard Surety Company, America Re-Insurance Com-

pany, Employees' Re-Insurance Group, and General Re-Insurance Group (hereinafter "Sureties"), are and were at all times material herein respectively corporations and citizens of states other than Texas or Arizona. Defendant Union Tank Car Company (hereinafter "Union"), is and was at all times material herein a corporation and a citizen of New Jersey, having a principal place of business in Illinois. Graver Tank and Mfg. Company (hereinafter "Graver"), is and was at all times material herein a division of Union and not a separate entity. Defendant Ward Industries Corporation (hereinafter "Ward"), is and was at all times material herein a corporation and a citizen of Delaware, having a principal place of business in New York, and is sued herein by Mosher as a member of a Joint Venture composed of Ward and Idaho-Maryland Industries, Inc., (hereinafter "IMI"). None of the defendants at any time material herein had a principal place of business in either Texas or Arizona.

2. All acts, conduct, and documents of Graver, or relating to Graver, mentioned or described in these Findings are the acts, conduct, and documents of Union and relate to Union. The terms "Graver" and "Union" are interchangeable and both refer to and mean defendant "Union". (Statement of Uncontested Facts, ¶ 3.)

3. The matter in controversy between Mosher and defendants exceeds $10,000, exclusive of interest and costs; and Mosher's claim against defendants Fluor and Sureties, asserted in Count I of Mosher's Amended Complaint, is asserted under the Miller Act. (40 U. S. C. §§ 270a, et seq.)

4. The United States of America entered into a written contract dated May 29, 1961, with Fluor, whereby Fluor agreed to perform work and to furnish services, labor, equipment, and materials for the construction of certain missile launch facilities near Davis-Monthan Air Force Base, Tucson, Arizona. (Jt. Ex. 1 in evidence.)

5. In connection with the Davis-Monthan job (the contract described in Finding No. 4), defendants Fluor and Sureties executed a payment bond. (Jt. Ex. 49 in evidence.)

6. The United States of America entered into a written contract dated May 29, 1961, with Matich Bros. and M. M. Sundt Construction Corp., whereby Matich and Sundt agreed to perform work and to furnish services, labor, equipment and materials for the construction of certain missile launch facilities near Vandenberg Air Force Base, Lompoc, California. (Statement of Uncontested Facts, ¶ 10.)

7. On September 8, 1961, Fluor entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Fluor's prime contract described in Finding No. 4 to be performed and supplied by Fluor upon the Tucson project. (Jt. Ex. 2 in evidence.)

8. On September 8, 1961, Matich Bros. and Sundt entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Matich

Bros. and Sundt's prime contract described in Finding No. 6 to be performed and supplied by Matich Bros. and Sundt upon the Vandenberg AFB project. (Jt. Ex. 4 in evidence.)

9. On or about July 14, 1961, a document (Union Ex. 4 in evidence) captioned "Letter of Intent Preparatory to Formal Agreement" was executed by and between IMI and Ward, wherein Ward and IMI expressed their intention as more particularly specified in the document, to execute a joint venture agreement for the performance of work on a proposed subcontract to IMI under a letter of intent from Union. (Statement of Uncontested Facts, ¶ 13.)

10. On July 28, 1961, IMI and Ward executed a document (Union Ex. B in evidence), captioned "Joint Venture Agreement". (Statement of Uncontested Facts, ¶ 14.)

11. Thereafter, and prior to October 23, 1961, with Union's approval, IMI and Ward executed and entered into, as of July 28, 1961, a revised Joint Venture Agreement (Jt. Ex. 7 in evidence), creating the joint venture to be known as, and hereinafter referred to as "IMI-Ward".

12. On October 23, 1961, defendant Union, acting through Graver, entered into a written subcontract with IMI-Ward (Jt. Ex. 8 in evidence), under the terms of which IMI-Ward undertook and agreed to perform certain of the work and supply certain of the materials and other items provided in Union's subcontracts described in Findings Nos. 7 and 8, above, to be performed and supplied by Union upon the Tucson project and the Vandenberg AFB project. (Jt. Exs. 2 and 4 in evi-

dence.) The subcontract price provided in Jt. Ex. 8 in evidence to be paid to IMI-Ward is the sum of $8,525,-011.00, of which sum $7,971,293.00 is applicable to work of IMI-Ward at the Tucson job and the balance of $553,718.00 is applicable to the work at the Vandenberg AFB project.

13. Mosher brings this action against defendants Union, Ward, Fluor, and Sureties for $298,336.58, which it claims is owing to it for fabricating certain steel, for furnishing certain steel, and for freight charges relating to the delivery of steel, which steel was used and incorporated into the work at the Tucson project covered by Fluor's contract (Finding No. 4, Jt. Ex. 1 in evidence), Union's subcontract (Finding No. 7, Jt. Ex. 2 in evidence), and IMI-Ward's subcontract (Finding No. 12, Jt. Ex. 8 in evidence); and Mosher seeks in this action, also, to recover from defendants Union and Ward the sum of $22,716.96, which it claims is owing to it for fabricating and furnishing steel and for freight charges in connection with delivering steel, which steel was used in and incorporated into the work at the Vandenberg AFB project covered by Matich Bros. and Sundt's contract (Finding No. 6), Union's subcontract (Finding No. 8, Jt. Ex. 4 in evidence), and IMI-Ward's subcontract. (Finding No. 12, Jt. Ex. 8 in evidence.)

14. The revised Joint Venture Agreement (Jt. Ex. 7 in evidence) entered into between IMI and Ward expressly provides, *inter alia*, that the obligations of the joint venturers under the subcontract with Union (Jt. Ex. 8 in evidence) shall be joint and several; that all money, equipment, materials, supplies and other prop-

erty of any nature whatsoever required for or in connection with the performance of the IMI-Ward subcontract shall be held for the account of the joint venture; that their interests in any profits and their respective shares in any losses and liabilities that may result from the prosecution and completion of the work to be performed under and in connection with the subcontract with Union (Jt. Ex. 8 in evidence), and their interests in all property and equipment required by the Joint Venture in connection with such subcontract, shall be 50% each; that a Joint Venture Committee is established which shall have control of the Joint Venture and shall manage its affairs, determining all matters and questions in connection with IMI-Ward's performance of the subcontract with Union; that, subject to the control of the Joint Venture Committee, performance of the work required to be done under the sub-contract with Union shall be under the supervision of George J. Morton, Manager, whose authority to commit or bind IMI-Ward shall be limited to commitments related to the normal performance of the subcontract with Union; that IMI shall directly manage and be responsible to the Joint Venture for the production and installation of the work to be performed under the subcontract with Union, except that the Joint Venture Committee may assign the performance of other minor portions of the work to Ward, it being the intention of the parties that the work shall primarily be performed by IMI in facilities owned or operated by it; and that work and services performed by either IMI or Ward shall be done on the basis of the assumption and reimbursement by the Joint Venture of the actual cost of such work, including

overhead and general administrative expenses, but without profit.

15. At all times material herein, Denver Steel and Iron Works (hereinafter "D. S. I.") was a division of IMI (Ward Exs. A-1 through A-4 in evidence).

16. In June 1961, at a meeting held in Union's offices in Chicago, Sam Wilson, General Manager of D. S. I., was instructed by officers of Graver, including its president and Vice-President, as to a procedure which would be utilized in procuring raw steel on behalf of Graver for use in performing Graver's subcontract on the Tucson and Vandenberg AFB projects, under which procedure Wilson would negotiate for the steel with steel companies and advise the companies, when agreement as to price and delivery had been reached, that Graver's purchase order for the steel would be forthcoming. (RT 222, 231).

17. Pursuant to such procedures, Sam Wilson arranged for the purchase of raw steel to be fabricated under the IMI-Ward subcontract with Union. In the negotiations with the steel mills, Wilson always negotiated on the basis, and so advised the mills, that Graver would issue the purchase order for the steel. (RT 181, 222, 231.)

18. Prior to October 13, 1961, George Morton, Manager of IMI-Ward, was told by officers and employees of Graver that IMI-Ward was not on schedule and that Morton would have to expedite the subcontract work. (Morton Dep., Plt's. Ex. 39 for identification, pp. 11-13.)

19. The raw steel which was originally intended to be fabricated by IMI-Ward at D. S. I. was owned by Graver. (RT 181; Jt. Ex. 8 in evidence, ¶ 5, p. 4.)

20. Lionel Lancaster, Graver's Vice-President, on October 10 or 11, 1961, at Denver, instructed Sam Wilson of D. S. I., who was having problems completing steel fabrication in time to meet delivery requirements under IMI-Ward's subcontract with Graver, to farm out the fabrication of the raw steel to others in order to meet delivery (RT 185-6); and he further advised Wilson that if he should negotiate a satisfactory contract with Mosher for the fabrication, a Graver purchase order to Mosher would be forthcoming. (RT 188, 234). At this time, Wilson told Lancaster and Thomas D. Harle, Graver's Director of Purchases, that he didn't believe Mosher would accept an IMI purchase order and that he, Wilson, desired to give Mosher a Graver purchase order. Lancaster advised Wilson that a Graver purchase order would be forthcoming. (RT 187-188, 233.) Harle and Lancaster approved of Wilson's selection of Mosher as a fabricator. (RT 233.)

21. Wilson went to Texas and on October 13, 1961, on behalf of Graver, negotiated with Mosher the complete terms, prices, and conditions of a contract for Mosher to fabricate steel required for the Tucson project (RT 193-4), advising Mosher that a Graver purchase order would be issued to cover the work. (RT 74, 187). The matters agreed upon by Wilson and Mosher were reduced to writing by Mosher on October 16, 1961. The writing was signed by Mosher's Senior Contracting Engineer and transmitted to Wilson at Denver, who signed

it on behalf of Graver on October 20, 1961. Thereafter, Wilson mailed the executed writing to Mosher, who received it on October 26, 1961 (Plt's. Ex. 1 in evidence; RT 194). Wilson sent copies of Plt's. Ex. 1 to IMI at Los Angeles and Tucson, and to Graver at Tucson; and Wilson handed a copy of Plt's. Ex. 1 to Harle at Denver. (RT 194). Upon Wilson's return to Denver and before he received the October 16 letter (Plt's. Ex. 1 in evidence), Wilson told Harle of the agreement he had reached with Mosher's Burton and Mitchell at Dallas. (RT 235.)

22. On October 13, 1961, Wilson knew the credit reputation of IMI and felt the same would not be satisfactory to Mosher. (RT 191.) Mosher would not have accepted a purchase order on the credit of IMI because of its impaired credit rating known to Mosher from credit reports in its possession. (RT 438; Jt. Exs. 52 through 58 in evidence.)

23. On October 13, 1961, Mosher, through its Treasurer, Russell Moore, accepted the order placed by Wilson on that date to fabricate steel for Graver, and Mosher's shop order 66109 was marked open on October 17, 1961, showing Graver as the customer. (RT 351; Jt. Ex. 12 in evidence.)

24. Mosher, considering itself bound, began performance under the October 13, 1961, oral agreement and expended labor for engineering between October 18 and October 24, 1961. (RT 251.) Mosher's shop started making templates on October 23, 1961. Steel began to arrive in Houston from Graver on October 23, 1961, in railroad cars sent, freight collect, by Graver. (RT 285, 286.) Up

to November 16, 1961, Mosher had incurred in excess of $40,000 in costs for shop work, overhead and costs of fabricating Graver steel, including inbound freight. (RT 287.)

25. Harle, Graver's Director of Purchases and Expeditor for the Tucson job, telephoned Ralph Burton, Mosher's Vice-President on October 19, 1961, and arranged to meet with Burton at Denver on October 23, 1961. (RT 253.) At that meeting, the parties discussed the October 16 letter (Plt's. Ex. 1 in evidence) in detail, Harle advising Burton that Graver would issue its purchase order to Mosher within two to three weeks and that the October 16 letter would serve as an interim purchase order until a formal purchase order could be sent by Graver. Harle also advised Burton that Wilson had signed Plt's Ex. 1 in evidence and had returned it to Mosher at Dallas. (RT 253-258.) As Director of Purchases, Harle possessed and exercised authority to issue purchase orders for Graver. (RT 905.)

26. On October 19, 1961, Mosher received from Harle a written procedure of Union's regarding shipments of steel to Mosher. This document referred to Mosher's order No. 66109, the same number carried on the October 16 letter. (Jt. Ex. 60; Plt's. Ex. 1 in evidence.)

27. Prior to October 23, 1961, Harle had directed that raw steel be forwarded from D. S. I. to Mosher at Houston and that other steel be sent from the steel mills to Mosher at Houston. (RT 254, 285-286; Jt. Ex. 60 in evidence.) This steel was owned by Graver and was stenciled "Property of Graver Tank & Mfg." (RT 181, 905.)

28. Although prior to October 31, 1961, Union's Vice-President Lancaster, Director of Purchases Harle, and Senior Contract Engineer Branting knew that Wilson had undertaken to contract on behalf of Graver for Mosher to fabricate steel for the Tucson job and knew of the contents of Plt's. Ex. 1 in evidence (RT 253-258); Jt. Ex. 60 in evidence; Union Ex. G in evidence), no officer or employee on behalf of Union ever question with either Wilson or Mosher, Wilson's conduct in acting on behalf of Graver. (RT 199-200.) However, the Graver purchase order which Wilson had assured Mosher would be forthcoming (Finding No. 21) and which Harle had informed Mosher would be issued to it (Finding No. 25), never was issued or delivered to Mosher.

29. On October 31, 1961, Wallace Orr, Director of Contracts for IMI-Ward, and W. E. Holmes, Manager of Construction for IMI-Ward, by direction of George Morton, IMI-Ward Manager, came to Texas for the purpose of negotiating a contract between IMI-Ward and Mosher for the fabrication of steel to be used in the Tucson and Vandenberg AFB jobs. (RT 791.) During negotiations with Burton and Mitchell of Mosher, Holmes and Orr talked of ordering steel fabricated for the Vandenberg AFB job and asked if Mosher would change the Customer on the steel job which Wilson had negotiated in Graver's name (Plt's. Ex. 1 in evidence) from Graver to IMI-Ward, explaining that it would make matters much easier and simpler for them from an accounting standpoint if Mosher accepted the change and accepted an IMI-Ward purchase order. (RT 261-265.) Holmes and Orr stated that if the change

could be made, IMI-Ward would be the customer and they furnished IMI-Ward's address. (RT 88.) Holmes and Orr were told by Mitchell and Burton that only Russell Moore, Treasurer of Mosher, at Houston, could give approval for the requested change. Burton reached Moore by telephone and Moore stated that IMI-Ward would be accepted as purchaser provided Graver would be responsible for payment, which statement Burton passed on to Holmes and Orr. (RT 90, 264-265, 354.) Holmes and Orr stated they would look further into the matter and let Mosher know. (RT 90.)

30. Following his return to California from Texas, Orr caused the purchase orders which are Jt. Exs. 9 and 10 in evidence to be prepared by Frank J. Wright, purchasing man for IMI-Ward, and sent to Mosher. (RT 796-798, 863.) The purchase orders were received by Mosher in Dallas on November 10, 1961. At the time Wright prepared and signed the purchase orders, there were in existence no IMI-Ward purchase order forms and Wright utilized IMI purchase order forms intending to obligate IMI-Ward. (RT 825-826, 798.) Mosher did not enter any change in its shop order for the Tucson job nor did it enter any shop order for the Vandenberg job until November 16, 1961. (RT 90-93.) Mitchell, Mosher's Senior Contracting Engineer, held the purchase orders (Jt. Exs. 9 and 10 in evidence) on his desk in Dallas until November 16, 1961, when he transmitted them to Mosher's main office in Houston, where they were received on November 17, 1961.

31. On November 7, 1961, Harle, Graver's Director of Purchases, was in the Mosher offices in Houston and

was told by Moore, Mosher's Treasurer, that he would not release shipments of the steel which Mosher was fabricating until Mosher received confirmation that Graver would be responsible for payment for the material. (RT 354-355). Harle suggested to Moore that he should get in touch with the person who could give assurance of payment, John Page, Graver's Controller, in Chicago, and Harle reached Page by telephone and informed him of Mosher's requirement in order to release the steel shipments. Moore also talked to Page and told him that the steel would be shipped to the missile sites only upon an agreement that if Mosher was not paid within the terms of the sale, then Graver would have to be responsible for paying Mosher. (RT 355.) Page advised Moore that approval for carrying out Moore's request would have to be sought from Morton, Manager of IMI-Ward, and Page told Moore that he would get in touch with Morton and advise Moore of the result. (RT 356.)

32. Prior to this time, Page had learned that Mosher was demanding a guarantee by Graver of the entire account and had talked with Vernon John of IMI-Ward about it, Page telling John that a guarantee would be considered only on the written request of John which must include an agreement that any payment by Graver to Mosher could be withheld from IMI-Ward. (Union Ex. K in evidence.)

33. On November 13, 1961, Orr of IMI-Ward telephoned Moore and requested Moore to accept a purchase order solely on the credit of IMI-Ward. When Moore refused, Morton, IMI-Ward Manager, got on

the phone and made the same request, which was also rejected by Moore. Moore advised Morton to contact Graver's Controller Page to get Page's approval for Graver's paying Mosher for its work, and Morton stated that if these were Mosher's conditions he would have to give his approval to Page. (RT 357-360.)

34. On November 31, 1961, Vernon John, for IMI-Ward, addressed a letter to Page, Graver's Controller, authorizing Graver to pay Mosher's invoices which would approximate $225,000, after acceptance of Mosher's work by IMI-Ward, and to deduct the amounts of such payments from the total IMI-Ward subcontract price for its work on the Tucson and/or Vandenberg AFB sites. (Jt. Ex. 26 in evidence.) Page had requested John to write him a letter of this nature. (RT 737-738.) John's letter was not received in Page's office until December 11, 1961, by which date Page had left his office permanently; but Harle, Graver's Director of Purchases, was shown a copy of the letter in IMI-Ward's California offices by Frank Wright of IMI-Ward on November 14, 1961. (RT 902.) On December 6, 1961, Harle wired Frank Wright that John's letter had not been received by Graver and asked that John mail immediately a duplicate of the letter, dated November 13, 1961. (Jt. Ex. 25 in evidence.)

35. On November 15,1961, Moore telephoned Page in Chicago and Page informed him that a clearance had been obtained from Morton for Graver's paying Mosher directly and informed Moore that Graver would make payment to Mosher directly, with deduction being made from the IMI-Ward contract. Page advised Moore, also,

that he would write Moore a letter to this effect. (RT 360-362.)

36. On November 15, 1961, and prior to the telephone conversation between Moore and Page, Harle sent Page a TWX (Jt. Ex. 45 in evidence) and had also talked with Page by telephone, with the result that Page had informed him that Page would take care of the problem relative to the credit. (RT. 913.) On the same day, Harle wrote a letter to Burton, of Mosher, stating that the letter from Page should be in Moore's hands on November 15 or November 16. In his letter to Burton, Harle gave specific instructions to Mosher regarding how the doing of the steel fabrication work and its delivery should be accomplished. (Jt. Ex. 50 in evidence.)

37. Prior to Page's conversation with Moore on November 15, 1961, Harle had informed Page that Mosher sought a guarantee of the whole account and that Page would have to resolve this problem. (RT 756-757.) When talking to Moore on November 15, 1961, Page knew that Mosher was requiring that Graver assure payment of the entire account. (RT 751-754.)

38. Following his telephone conversation with Moore on November 15, 1961, Page sent Mosher a telegram stating: "Please accept this wire as a guarantee of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week." (Jt. Ex. 22 in evidence.) When Page informed Moore on the telephone that he would write a letter (Finding No. 35), he intended Moore to understand that the letter was to relate to the entire fabrication job, not just the first shipment. (RT 746-748,

752.) By the letter mentioned in the second sentence of the November 15 telegram to Moore (Jt. Ex. 22), Page intended Moore to understand that the letter would be one concerning the entire account. (RT 750.)

39. On November 16, 1961, by authorization of Moore, Mosher's Treasurer, Mitchell entered the supplements required to Mosher's shop order 66109 to change the customer's name on the order from Graver to IMI, with credit on the order marked "Open" and shipments to be made to Graver at Tucson. At the same time, Mitchell also entered shop order 66146 to IMI to cover the fabrication of the Vandenberg work. (RT 92-93; Jt. Exs. 13 and 79 in evidence.) By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. Moore authorized the supplement to shop order 66109 and the entry of shop order 66146 by reason of that understanding; and he permitted the release and shipment of the steel fabricated by Mosher pursuant to Jt. Exs. 9 and 10 upon that understanding. Had it not been for Page's statement to Moore on November 15 and Page's telegram of November 15, Mosher would not have accepted either IMI or IMI-Ward as its customer and it would not have proceeded with the work pursuant to Jt. Exs. 9 and 10 in evidence.

40. In agreeing to pay Mosher directly, Graver, through Page, acted primarily to protect and advance its own interests under its subcontracts with Fluor and Matich Bros. and Sundt (Jt. Exs. 2 and 4), because it

had a definite stake in seeing to it that the fabricated steel came to the Tucson and Vandenberg sites.

41. After November 16, 1961, pursuant to the terms of Jt. Exs. 9 and 10 in evidence and to Graver's agreement to pay Mosher directly, Mosher fabricated the material described in Jt. Exs. 9 and 10 and delivered it to the Tucson and Vandenberg jobs. Graver supplied 1200 tons of the steel which Mosher fabricated for the Tucson job and 90 tons of the steel which Mosher fabricated for the Vandenberg job. In addition, Mosher supplied from its own stock 165 tons of steel which it fabricated for the two jobs. In connection with the fabrication and delivery of this steel, Mosher expended $18,054.35 for inbound freight charges on steel shipped to it freight collect by Graver and $46,066.92 for outbound freight charges. (Jt. Exs. 9 and 10 in evidence; RT 287, 377-379,905.) Computed in accordance with the prices and terms contained in Jt. Exs. 9 and 10 in evidence, Mosher's charges and invoices for the steel fabricated and delivered to the Tucson job totalled $298,336.58 and for the steel fabricated and delivered at the Vandenberg site $22,712.96. (Jt. Ex. 14 in evidence.)

42. Pursuant to the purchase orders which are Jt. Exs. 9 and 10 in evidence, Mosher furnished items of work which were required to be furnished by IMI-Ward under its subcontract with Graver. (RT 555.) The prices provided in Plt's. Ex. 1 in evidence and Jt. Exs. 9 and 10 in evidence to be paid to Mosher for doing the steel fabrication were lower than the prices which IMI-Ward quoted to Graver in bidding for the subcontract with Graver. (RT 242-243.)

43. IMI had no subcontract from IMI-Ward to perform, in its own behalf, any of the work contemplated by the IMI-Ward subcontract with Mosher (RT 677; Union Ex. CCC-1 for identification, pp. 136-139; Jt. Ex. 7 in evidence); and the work IMI did on the Tucson and Vandenberg sites was performed solely pursuant to the Joint Venture Agreement. (Jt. Ex. 7 in evidence.) Mosher, in all its acts and dealings with regard to, or pursuant to, Jt. Exs. 9 and 10 in evidence understood and acted upon the belief that the purchaser or other contracting party was IMI-Ward.

44. In the first few weeks of December 1961, Page left his office with Graver in Chicago and never returned to it, his employment with Graver being terminated on December 12, 1961. (RT 740; Plt's. Ex. 36 for identification, p. 348.) However, when Page was terminated, other officials of Graver, including Feurt, Manager of Construction Accounting, and Trytten, Acting Controller, knew of the existence of IMI-Ward's letter to Page authorizing Graver to pay Mosher's invoices (Jt. Ex. 26 in evidence), and knew that Page had informed Moore that Graver would make payment directly to Mosher and that Page would write Moore a letter to this effect. They knew, also, that Mosher was going ahead on the work described in Jt. Exs. 9 and 10 in evidence in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. In fact, immediately after Page was terminated, these officials began the preparation of procedures for the direct payment to Mosher

of its invoices and they drafted a letter such as Page had promised Moore he would write, to be sent to Mosher guaranteeing payment of all amounts which should become due to Mosher for steel furnished to IMI-Ward for the Tucson and Vandenberg jobs. (Plt's. Ex. 36 for identification, pp. 450, 451; Jt. Ex. 24 in evidence; Jt. Ex. 21 in evidence.) The letter (Jt. Ex. 21 in evidence) was never executed or sent to Mosher because Lancaster, Graver's Vice-President, pointed out that Mosher was proceeding with the steel shipments and suggested that the matter of a written guarantee be deferred until it was requested by Mosher and then be given on a "separate shipment basis." (Jt. Ex. 24 in evidence.)

45. After the execution of the subcontract between Union and IMI-Ward (Jt. Ex. 8 in evidence), IMI-Ward assigned all invoices arising out of the subcontract to the United California Bank at Los Angeles, California. Notice of such assignment was given to Union and a copy of the assignment was recorded in the office of the County Recorder of Los Angeles County, California (Union Exs. MM and KK in evidence); however, there is no evidence in the record that Mosher was given or ever obtained from any source prior to the institution of this action, notice of the assignment.

46. In December 1961, Frank Wright, Purchaser for IMI-Ward, advised Moore, of Mosher, that Mosher's invoices theretofore issued to IMI-Ward were not billed by sites and levels. Mosher then rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962. (RT 366-367.)

47. On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division, No. 137024-WB. On February 5, 1962, IMI, as the debtor in possession of its assets, filed an application to turn over possession of a certain manufacturing facility which it owned in Tucson, Arizona, to Graver under certain letter agreements dated February 1, 1962, and February 5, 1962. (Statement of Uncontested Facts, ¶ 17.)

48. The letter agreements of February 1 and February 5, 1962, were approved by the Referee in Bankruptcy on February 5, 1962, and IMI was authorized to accept Graver's offer in the letter agreement of November 5, 1962, and to turn over its Tucson facility to Graver. (Statement of Uncontested Facts, ¶ 18.)

49. Mosher's charges for work performed pursuant to Jt. Exs. 9 and 10 in evidence and delivered after February 2, 1962, are in the approximate sum of $55,000. (RT 384.)

50. Union caused to be prepared for presentation to the Referee in Bankruptcy in the IMI Chapter 11 proceedings, certain documents (Union Exs. ZZ, NNNN and PPPP in evidence) relating to Union's claim against IMI. The documents relate to the Tucson job and to the status, as of February 2, 1962, of the work subcontracted by Union to IMI-Ward. (RT 625-627.)

51. On March 20, 1962, Mosher sent to Fluor, by registered mail, the original of the letter and the statements and invoices which are part of Plt's. Ex. 24 in evidence.

52. In August, 1962, Mosher filed its proof of claim in the Chapter 11 proceedings of IMI, claiming that the debtor, IMI, was indebted to it for $22,716.96 for steel fabricated and delivered and furnished at Vandenberg and for $298,336.58 for steel fabricated, delivered and furnished at Tucson. The claim was filed as an unsecured claim, as qualified in paragraph 10 thereof, wherein Mosher alleged that Ward, as joint venturer with IMI, Union, and Fluor and its sureties were also liable to Mosher for the entire debt of $321,053.54, and that the filing of the claim was without prejudice to its rights against Ward, Union, and Fluor and its sureties. (Union Ex. E in evidence.)

53. On December 31, 1963, the Referee, pursuant to a plan of arrangement, ordered issued to Mosher in settlement of its claim against the debtor, IMI, certificates for 642,107 shares of IMI stock. (Union Ex. D in evidence.) Thereafter, IMI changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 "reverse split" (Jt. Ex. 39 in evidence), whereby Mosher received 32,105 shares of Allied Equities Corporation stock, the value of which has been established by stipulation of all parties to this action at $1.625 per share, or a total of $52,170.62. (RT 682.) The order for the issuance of such stock referred to a stipulation entered into between Mosher and the debtor, IMI, reiterating and reserving Mosher's claims against Ward, Union, and Fluor and its sureties, and referring to this action then pending in this Court. (Plt's. Ex. 26 in evidence.) Further, Mosher in the bankruptcy proceeding advised the Referee, and the Ref-

eree had notice, of Mosher's claims and position against Ward, Union, and Fluor and its sureties and of the pendency of this action by Mosher against Ward, Union, and Fluor. (Plt's. Ex. 30 in evidence, p. 4, ¶ 8, Findings of Fact, etc.)

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of all parties to this action; and it has jurisdiction of the claims asserted herein by Mosher against defendants Fluor and Sureties by virtue of 40 U.S.C. § 270b, and of the claims asserted herein by Mosher against all defendants by virtue of 28 U. S. C. § 1332.

2. Mosher is not barred or estopped from recovering from defendants in this action by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued to it on its claim.

3. Mosher had a direct contractual relationship with Union and Mosher gave Fluor the written notice required by 40 U. S. C. § 270b.

4. IMI, in all its dealings with Mosher, was authorized to and did act for and on behalf of IMI-Ward. In furnishing, fabricating, and delivering the steel for the Tucson and Vandenberg jobs pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence, Mosher did not deal with, nor rely upon the credit of, IMI, individually, but Mosher performed pursuant to its agreement with IMI-Ward. Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance

of the terms and provisions on Mosher's part contained in Jt. Exs. 9 and 10, in the amount of $298,336.58 for steel furnished, fabricated, and delivered to the Tucson job and in the further sum of $22,716.96 for the steel furnished, fabricated, and delivered to the Vandenberg site.

5. IMI is not an indispensable party to this action.

6. Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961, and subsequently, with relation to Jt. Exs. 9 and 10 in evidence, constituted a contract and had the legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of Jt. Exs. 9 and 10 for furnishing, fabricating, and delivering steel to the Tucson and Vandenberg jobs. Pursuant to the terms and provisions of Jt. Exs. 9 and 10, there became due to Mosher for furnishing, fabricating, and delivering steel to the Tucson job the sum of $298,336.58 and for furnishing, fabricating, and delivering steel to the Vandenberg job the sum of $22,716.96; and Union is liable to Mosher for these amounts.

7. The sending to Mosher of the letter mentioned in Page's telegram of November 15, 1961, was not intended by Page to be a condition precedent to Union's agreement or obligation to pay Mosher; but if it was, Union is estopped to raise the non-performance of the condition as a defense in view of the facts set out in Finding of Fact No. 44, supra.

8. In connection with Union's agreement to pay Mosher directly, Union and IMI-Ward agreed that Union might pay Mosher for its work, after acceptance of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward. However, the existence of an indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher was not a condition precedent to its obligation to pay Mosher.

9. Mosher fully carried out and performed each and all of its promises and agreements contained in Jt. Exs. 9 and 10 in evidence. IMI-Ward accepted Mosher's work performed under Jt. Exs. 9 and 10 and Mosher was entitled to IMI-Ward's approval for payment of Mosher's invoices for such work.

10. The assignment of invoices by IMI-Ward to United California Bank did not affect Mosher's rights against either Union or Ward.

11. No provision of the Statute of Frauds relied upon by Union herein constitutes a defense to the claims of Mosher in this action.

12. Fluor and Sureties are liable to Mosher under their payment bond executed and delivered in connection with the Davis-Monthan job in the sum of $298,-336.58.

13. Defendants are entitled to credit in the amount of $52,170.62 upon their respective obligations to Mosher, that amount being the agreed value of the stock received by Mosher upon its claim in the IMI bankruptcy proceedings.

14. Mosher is entitled to judgment herein against Fluor and Sureties in the sum of $246,165.96, and against Ward and Union in the sum of $268,882.92.

15. Inasmuch as Mosher's claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to the entry of judgment herein.

ORDER FOR JUDGMENT.

The clerk is directed to forthwith enter judgment herein, as follows:

In favor of Mosher and against defendants Fluor and Sureties, and each of them, for the sum of $246,165.96, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against defendant Ward and Union, and each of them, for the sum of $268,882.92, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against all defendants, and each of them, for Mosher's costs of suit herein.

Dated: May 24, 1966.

JAMES A. WALSH,
United States District Judge.